No. 82-1651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CRISPUS NIX, WARDEN OF THE
IOWA STATE PENITENTIARY,

Petitioner,

—v.—

ROBERT ANTHONY WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *AMICUS CURIAE*

IN SUPPORT OF AFFIRMANCE

JAMES E. DUGGAN*
JOANNE S. GREEN
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
New Hampshire Appellate
Defender Program
Franklin Pierce Law Center
2 White Street
Concord, New Hampshire 03301
(603) 228-1541

**Counsel of Record*

QUESTION PRESENTED

Whether Stone v. Powell, 428 U.S. 465 (1977), should be extended to preclude federal habeas corpus review over claims that certain physical evidence was obtained and erroneously admitted at trial in state court in violation of the Sixth Amendment right to counsel.

TABLE OF CONTENTS

Page

Question Presented. 1

Table of Authorities. iii

Interest of Amicus. 1

Summary of Argument 3

Argument

I. THE "INEVITABLE DISCOVERY" DOCTRINE PROPOSED BY THE PETITIONER IS INCONSISTENT WITH THE SIXTH AMENDMENT RIGHT TO COUNSEL 5

II. INSURING THE INTEGRITY OF THE ADVERSARY PROCESS REQUIRES THAT STONE V. POWELL NOT BE EXTENDED TO PREVENT THE EXCLUSION OF PHYSICAL EVIDENCE OBTAINED IN VIOLATION OF THE RIGHT TO COUNSEL 6

Conclusion. 19

TABLE OF AUTHORITIES

Page

CASES:

Cardwell v. Taylor, ___ U.S. ___, 103 S.Ct. 2015 (1983) 7

Estelle v. Smith, 451 U.S. 454 (1981) 17, 18

Gideon v. Wainwright, 372 U.S. 335 (1963) 10, 18

Kirby v. Illinois, 406 U.S. 682 (1972) 8, 10

Massiah v. United States, 377 U.S. 201 (1964) 10, 11, 12, 14

Powell v. Alabama, 287 U.S. 45 (1932) 9

Rose v. Mitchell, 443 U.S. 545 (1979) 7, 9, 14

Spano v. New York, 360 U.S. 315 (1959) 14

TABLE OF AUTHORITIES (cont.)

	Page
Stone v. Powell, 428 U.S. 465 (1977)	3, 5, 6, 7, 8, 13, 18
Weatherford v. Bursey, 429 U.S. 545 (1977)	15

OTHER AUTHORITIES:

Schulhoffer, Confessions and the Court, 79 Mich. L. Rev. 865 (1981)	15

No. 82-1651

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CRISPUS NIX, WARDEN OF THE
IOWA STATE PENITENTIARY, PETITIONER

v.

ROBERT ANTHONY WILLIAMS, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INTEREST OF AMICUS

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose members include the great majority of public defender offices, co-ordinated assigned counsel

systems and legal services agencies in the nation. The organization also includes two thousand individual members, most of whom are private practitioners.

NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional rights, particularly from violation by police, and in assuring full access to the courts for trial, appellate and habeas litigation concerning those rights. Consistent with this interest, NLADA believes that persons convicted in state courts should have available broad review and remedies in federal courts.

SUMMARY OF ARGUMENT

The doctrine of Stone v. Powell, 428 U.S. 465 (1977), should not be extended to foreclose federal habeas corpus review of claimed Sixth Amendment violations. The right to counsel ensures the fairness of trial and thus preserves the integrity of our adversary system of criminal justice. In the Sixth Amendment context, the exclusionary rule is not applied primarily to deter police behavior; rather, its purpose is to ensure that evidence gathered in contravention of the adversary process does not taint and unbalance the trial itself.

The reliability of evidence obtained in violation of the right to counsel has

been, and should continue to be, irrelevant to the question of its admissibility. The introduction of such evidence at trial, whether or not reliable, seriously undermines defense counsel's role, and infects the trial itself.

ARGUMENT

I. THE "INEVITABLE DISCOVERY" DOCTRINE PROPOSED BY THE PETITIONER IS INCONSISTENT WITH THE SIXTH AMENDMENT RIGHT TO COUNSEL.

The National Legal Aid and Defender Association, as amicus curiae, fully supports the argument of the respondent in this action that adoption of the "inevitable discovery" doctrine -- more aptly referred to by the respondent as the "hypothetical probable discovery" doctrine -- would be inconsistent with the fundamental purposes of the Sixth Amendment right to counsel. However, because the interests of the NLADA in this case relate primarily to the question of whether the holding of Stone v. Powell,

428 U.S. 465 (1977), should be extended from Fourth Amendment cases to Sixth Amendment cases, this amicus brief will focus on that question.

II. INSURING THE INTEGRITY OF THE ADVERSARY PROCESS REQUIRES THAT STONE V. POWELL NOT BE EXTENDED TO PREVENT THE EXCLUSION OF PHYSICAL EVIDENCE OBTAINED IN VIOLATION OF THE RIGHT TO COUNSEL.

The petitioner argues that this Court should extend the holding of Stone v. Powell, 428 U.S. 465 (1977), to preclude federal habeas review when a claim is made that a state court has erroneously admitted "reliable" evidence in violation of the defendant's Sixth Amendment right to counsel if the state court has provided a full and fair opportunity to

litigate the claim. This argument fails to appreciate the difference between Fourth and Sixth Amendment claims, unduly emphasizes the reliability of evidence in defining the availability of federal habeas review, and advances a rule that will confuse the scope of federal habeas review.

This Court in Stone v. Powell carefully limited the reach of its opinion to review of the judicially created exclusionary rule in the Fourth Amendment setting, "stress[ing] that its decision to limit review was 'not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.'" Rose v. Mitchell, 443 U.S. 545, 560 (1979), quoting Stone v. Powell, 428 U.S. at 495 n. 37. Cf. Cardwell v. Taylor, ____ U.S. ____, 103 S.Ct. 2015 (1983).

Enforcement of Fourth Amendment claims by an exclusionary rule attempts to regulate police conduct occurring outside the framework of the adversary system. Recognizing this and rejecting the notion that illegally seized evidence "taints the judicial process," Stone v. Powell held that in the context of Fourth Amendment claims federal habeas review was unnecessary to secure compliance with that Amendment.

The right to counsel, on the other hand, is an integral part of the adversary process. It is guaranteed at and after the initiation of adversary judicial proceedings. Kirby v. Illinois, 406 U.S. 682 (1972). Police conduct that infringes on the function of counsel undermines and

dilutes the role of counsel in the adversary system.

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial ... the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Powell v. Alabama, 287 U.S. 45, 57 (1932).

Interference with the function of defense counsel thus seriously denigrates the accused's right to a fair trial. And guaranteeing the fairness of the trial is the essence of federal habeas jurisdiction. See [redacted] v. Mitchell, 443 U.S. at 582 (Powell, J., concurring) (habeas corpus review should be limited to "a challenge to the fairness of the trial itself.")

The fairness of the trial has its roots in the adversary process. See generally Gideon v. Wainwright, 372 U.S. 335 (1963). It is for this reason that a defendant in a criminal case has a constitutional right to counsel after

> the government has committed itself to prosecute, ... [when] the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Kirby v. Illinois, 406 U.S. at 689. It was not, therefore, only out of concern for the fairness of the pretrial police interrogation itself that in Massiah v. United States, 377 U.S. 201 (1964), the Court found the right to counsel to

apply. Rather, Massiah ensured that the trial which followed would be fair and not simply a replay of the extra-judicial interrogation of the defendant.

Unlike police conduct that flouts the Fourth Amendment, police conduct that interferes with counsel permits the prosecution to obtain evidence for use at trial by circumventing the basic rules of the adversary process. In Massiah, the Court held that the defendant's right to counsel had been violated not when the police acted improperly but "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added).

Moreover, the deterrence premise underlying the Fourth Amendment exclusionary rule as it relates to police conduct was utterly absent in the Massiah analysis of the Sixth Amendment violation. Indeed, the Court expressly stated that it may be appropriate in many cases for law enforcement to continue an investigation into the criminal activity of an accused and his associates. Nonetheless, it concluded, the statements obtained from the individual whose right to counsel had been violated "could not constitutionally be used by the prosecution as evidence against him at his trial." 377 U.S. at 207. (emphasis original).

The Massiah rule of exclusion for Sixth Amendment right-to-counsel violations was thus not intended to deter pre-

trial conduct by the police, but rather was meant to safeguard the fairness of the trial. The rationale behind Stone v. Powell - that collateral federal review of unlawful police conduct would not significantly aid in deterring such conduct - does not justify withdrawing federal habeas review of claims based on the Sixth Amendment rule of exclusion. The benefit to be gained by the continued applicability on habeas corpus of the exclusionary rule to Sixth Amendment claims is the protection of the integrity of the adversary process.

> [A] Constitution which guarantees a defendant the aid of counsel at ... trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less ... might deny a defendant "effec-

> tive representation by counsel at the only stage when legal aid and advice would help him."

Massiah v. United States, 377 U.S. at 204, quoting Spano v. New York, 360 U.S. 315, 326 (Douglas, J., concurring).

Moreover, federal habeas relief should not be foreclosed merely because the evidence at issue is "reliable" and probative; nor has this Court accepted the defendant's guilt as determinative of the issue. Rose v. Mitchell, supra, in fact, rejected this approach, and emphasized that federal habeas review must remain available to consider an issue unrelated to guilt where the integrity of the state judicial proceedings is questioned. Id., 443 U.S. at 559-564. This rule has particular applicability to right-to-counsel claims.

> When the government has made an "end run" around counsel, or effected pretrial discovery in disregard of the norms of legitimate adversary procedure, it is wholly beside the point to claim that the evidence obtained by such tactics was reliable. Use of the evidence taints the judicial proceedings in a fundamental way, and relief on habeas must remain open.

Schulhoffer, Confessions and the Court, 79 Mich. L. Rev. 865, 889-890 (1981).

Thus, where privileged communications between the defendant and counsel are intercepted by the government, the use of such undoubtedly "reliable" and probative information at trial violates the Sixth Amendment and is prohibited. See Weatherford v. Bursey, 429 U.S. 545 (1977). It is only by prohibiting the use of such evidence at trial, regardless of its reliability, that the right to counsel can

be protected. Federal habeas relief, even if the improperly procured evidence is reliable, must remain available to assure compliance with the Sixth Amendment and to preserve the integrity of the adversary criminal process.

For the same reasons, it is not enough to grant federal habeas review of Sixth Amendment claims involving confessions -- whose reliability is suspect -- while barring review of cases involving physical evidence. Such a rule would effectively hollow out the guarantees of the Sixth Amendment by encouraging illegal interrogation of defendants for the purpose of recovering not confessions, but derivative physical evidence.

The necessity of federal habeas review of Sixth Amendment claims is underscored by Estelle v. Smith, 451 U.S. 454 (1981). In Estelle, this Court excluded psychiatric opinion evidence derived from statements made by the defendant to the psychiatrist during an interview that occurred without notice to defense counsel. The rule urged by the State in the case at bar - that claims involving "reliable" and "probative" evidence obtained in violation of the Sixth Amendment should not be cognizable on federal habeas review - would arguably have applied in Estelle. Whether review was available or not would have turned on the reliability of the derivative evidence. This determination would have had to take into account the

myriad factors involved in predicting the future dangerousness of the individual. Estelle demonstrates that the reliability of the evidence is an unsatisfactory benchmark for federal habeas jurisdiction.

The judicial created exclusionary rule, which dters violations of the Fourth Amendment, is not a personal constitutional right. Stone v. Powell, 428 U.S. at 486. But the right to effective assistance of counsel, which is not so much enforced as defined by exclusion of evidence unfairly obtained, is a personal constitutional right that protects the adversary system of criminal prosecution. Gideon v. Wainwright, supra. As such, Sixth Amendment claims must remain cognizable in federal habeas corpus proceedings.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the Eighth Circuit Court of Appeals.

Respectfully Submitted,

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

By:

James E. Duggan
Joanne S. Green
New Hampshire Appellate Defender Program
Franklin Pierce Law Center
2 White Street
Concord, New Hampshire
(603) 228-1541

By James E. Duggan /s/
James E. Duggan
Attorney of Record

October 6, 1983